In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA EX rel Michael Bilokumsky, appellant,
v.
ROBERT E. TOD, COMMISSIONER OF IMMIGRATION at the port of New York, et al.
} No. 92.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellant was arrested by the authorities of the State of Pennsylvania on April 26, 1921, and charged with a violation of the Sedition Law of Pennsylvania. He was promptly afforded a hearing before a committing magistrate and held under bail for his appearance before the Court of Quarter Sessions of Philadelphia, a State Court of Criminal Jurisdiction. (Rec. 22.) Three days later, on April 29, while he was being held in Moyamensing Prison awaiting trial before that Court, an immigrant inspector of the United States interviewed him in a room within the prison. The appellant was sworn and

interrogated and a stenographic record of the questions and answers was made. In the course of this examination, which was exceedingly brief and direct, he admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation. (Rec. 31–33.) Shortly thereafter he was called to appear before the Court of Quarter Sessions. That Court, evidently being of the opinion that the public interest would be better served by the relator's deportation than by his imprisonment, referred the case to the United States authorities. (Rec. 24.)

The Secretary of Labor, on May 14, 1921, issued his warrant for the arrest of the appellant upon the ground that he was an alien having in his possession for the purpose of distribution printed matter which advocated the overthrow by force or violence of the Government of the United States. The warrant was authorized by sections 1 and 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended June 5, 1920, c. 251, 41 Stat. 1008. Upon this warrant the defendant was arrested and taken into the custody of the United States. He was then called for a hearing to show cause why he should not be deported. The rules of the Department of Labor, which provide that at the beginning of the hearing he shall be allowed to inspect the warrant of arrest and be advised of his right to have counsel (Rec. 40), were strictly observed (Rec. 13). His counsel was present. Under advice of counsel he declined to answer any questions whatever. (Rec. 14.) All

of the facts necessary to prove that he had in his possession for the purpose of distribution printed matter which advocated the overthrow by force or violence of the Government of the United States were fully presented in due form at this hearing. There was but one element of proof lacking, namely, that the appellant was an alien. To supply this evidence of his status the inspector offered the admission made by him under oath on April 29. An order of deportation followed, to prevent which the appellant sought a writ of habeas corpus.

The issues raised by the record are thus stated in appellant's brief (p. 4):

> The single point involved in this appeal is that the examination of Bilokumsky at Moyamensing Prison and the use of it in the subsequent deportation proceedings were contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

It is significant that the appellant has not denied, either in his petition for the writ or in his amended traverse to the return, that he is an alien. He does not aver that by threat of force or promise of reward he was induced in an unguarded moment to make a false statement. The inference is strong that he is in fact an alien and that he comes before this court not as one who has been deprived of any real and substantial right, but as one who hangs his case upon the barest technicality.

ARGUMENT.

I.

The appellant was not subjected to unreasonable search and seizure.

It is contended by the appellant that his examination by an immigrant inspector of the United States at Moyamensing Prison on April 29, 1921, was an unreasonable search and seizure contrary to the guaranty of the Fourth Amendment, and that, accordingly, the fruits of this examination could not lawfully be used against him in any subsequent proceedings. The contention overlooks the fact that on April 29 the relator was lawfully restrained of his liberty by the Commonwealth of Pennsylvania, in the custody of its officers, awaiting trial before one of its criminal courts. It is not the case of a defendant who has been arrested without a warrant and illegally searched or examined. His imprisonment was lawful, and there was no unreasonable search or seizure. He was not in the custody of the immigrant inspector, but was interviewed and examined by him in the same manner as he might have been in his own home or as any other person lawfully detained in prison may be examined.

The fact that his detention was lawful removes his case from the rule that the Government can not use the fruits of an illegal search and seizure in any subsequent proceeding against the person searched, and leaves for determination only the question whether the statement was voluntarily made.

It has been held in a number of cases that the examination of an alien without advising him of his right to have counsel and to decline to answer questions does not render his statement involuntary or make it inadmissible as evidence to support a deportation order.

In *Low Wah Suey* v. *Backus*, 225 U. S. 460, the petition for the writ of habeas corpus, as stated in the opinion (pp. 469–470), alleged that the alien "was refused the right to be represented by counsel during all stages of the preliminary proceedings and was examined without the presence of her counsel and against her will by the immigration officer at the Port of San Francisco, and before she had been advised of her right to counsel and before she was given an opportunity of securing bail, and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel." A demurrer was filed. It was the unanimous opinion of this Court that no constitutional right of the relator had been infringed and that an order of deportation based upon testimony so obtained, was valid.

In re Kosopud, 272 Fed. 330 (District Court, N. Dist. Ohio, E. Div., Westenhaver, J.), certain aliens, who had been arrested before formal written war-

rants were in the possession of the arresting officers were interrogated without the presence of any counsel representing them, and the statements then made were afterwards used in evidence. The orders of deportation based thereon were sustained. In the course of the opinion it is said, at page 336:

> Nor do I perceive any good reason why the arresting officer may not lawfully interrogate or examine the person arrested with respect to the charge made against him, even though the alien is not then represented by counsel and is under arrest. This is the usual course in criminal proceedings. Whether his statements thus made may be given in evidence against him depends upon whether or not they were voluntary. They will be presumed to have been made voluntarily unless the contrary appears, and they will be held to be involuntary only when shown to have been induced by threat, promise, or encouragement of hope or favor. The absence of counsel, the fact that the prisoner may not have been warned that he was not required to make a statement or that if he did it might be used against him, or that he was under arrest and restraint do not by themselves prevent the statements from being voluntary or make them incompetent as evidence. (See *Wilson* v. *United States*, 162 U. S. 613.)

In *United States ex rel Rakics* v. *Uhl*, 266 Fed. 646 (C. C. A., Second Circuit), the relator, being in prison at the time (p. 649), was examined on March 23, 1919, by a special agent of the Department of Justice,

and his examination, in question and answer form, was stenographically reported. A warrant of arrest was not issued until May 5, and the hearing was not held until May 7, 1919. The statement made on March 23 was introduced in evidence in the proceedings, and it does not appear that counsel or the District Court or the Circuit Court of Appeals saw any impropriety therein.

The examination of the relator in the instant case was brief, fair, and without any element tending to suggest duress or compulsion, or tending to show that his statement was an involuntary one.

II.

The appellant was not compelled in a criminal case to be a witness against himself.

The complaint of the appellant goes further, however, and urges that the use of his statement made on April 29 was in violation of the immunity from self-incrimination guaranteed by the Fifth Amendment. Ten cases are cited in his brief (p. 14), which hold that the provisions of the Fourth and Fifth Amendments "run almost into each other," and that papers which have been obtained by an illegal search or seizure can not afterwards be used in evidence against their owner in any criminal case or case brought to recover a fine, penalty, or forfeiture. An examination of these ten cases discloses that all of them were criminal cases, and that the ground for excluding the evidence was that the defendant was thereby deprived of

his constitutional immunity from self-incrimination. *Gouled* v. *United States*, 255 U. S. 298, 306, is typical.

These decisions are not applicable to the case at bar for two reasons. First, as we have already observed, the evidence here was not obtained as the result of an illegal search and seizure. Second, the constitutional immunity extends only to criminal cases and prosecutions for fines, penalties, or forfeitures.

It is well settled by the decisions of this Court that deportation proceedings are not criminal cases. In *Fong Yue Ting* v. *United States*, 149 U. S. 698, Mr. Justice Gray said (p. 730):

> The proceeding [deportation] * * * is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property,

> without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

In *Bugajewitz* v. *Adams*, 228 U. S. 585, Mr. Justice Holmes said (591):

> The attempt to reopen the constitutional question must fail. * * * The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.

To the same effect are—

> *Colyer* v. *Skeffington*, 265 Fed. 17, 23.
> *Skeffington* v. *Katzeff*, 277 Fed. 129, 131.

The immunity from self-incrimination guaranteed by the Fifth Amendment applies only to criminal cases and not to deportation proceedings.

III.

The appellant was not deprived of his liberty without due process of law.

It is urged by counsel for the appellant that he was deprived of his liberty without due process of law (1), because the rules of the Department of Labor were not followed in interviewing him on April 29, and (2) because, aside from these rules, the use of his statement then made is contrary to fundamental

principles of justice. Neither of these contentions can be sustained.

(1) The rules in question are printed in appellant's brief at page 7. It is to be noted that they provide what procedure shall be followed *after* a warrant of arrest has been issued by the Secretary of Labor. The purpose is to provide that counsel may be present throughout the making of the *formal record* on which an order for deportation must be founded. By their terms they do not apply to any investigations, examinations, or interviews made before the issuance of the warrant.

The record in the instant case shows that these rules were scrupulously observed from the time of the issuance of the warrant. Accordingly, the point which counsel make, that the Department did not follow its own rules, is not well taken.

(2) It is further urged, however, that the use of the relator's statement was "inconsistent with the fundamental principles of justice embraced within the conception of due process of law." (Brief for appellant, p. 11.) The argument of this proposition overlaps those which have preceded. The bases for the contention are (*a*) that the relator was not advised of his right to have counsel, and to remain silent if he desired, and (*b*) that the effect of the proceeding was to make the relator a witness against himself.

(*a*) The first of these two grounds is fully met in *Low Wah Suey* v. *Backus*, 225 U. S. 460, in which this Court sustained the former rules of the Department

of Labor which specifically provided for the private examination of an alien, and held that his constitutional rights were not infringed so long as he was permitted at some time during the hearing, and before the final order was made, to have counsel and to produce witnesses.

In *United States* v. *Sing Tuck*, 194 U. S. 161, the Court sustained the departmental regulations relating to the exclusion of Chinese. Mr. Justice Holmes said, at pp. 169, 170:

> The rules objected to require the officer to prevent communication with the parties other than by officials under his control, and to have them examined promptly touching their right to admission. The examination is to be apart from the public, in the presence of government officials and such witnesses only as the examining officers shall designate. * * * The separate examination is another reasonable precaution * * *.

(*b*) Nor does the fact that the use of his testimony may have the effect of making him a witness against himself deprive him of due process of law. The immunity from self-incrimination is not included in the legal content of "due process of law." In *Twining* v. *New Jersey*, 211 U. S. 78, 106–114, the subject is fully discussed, and it is held that the privilege of immunity from self-incrimination is not an immutable principle of justice which is the inalienable possession of every citizen of a free government, but is a constitutional right, applicable only

in criminal cases, which is separate, independent, and outside of due process of law.

The record is barren of any circumstance which can arouse sympathy for the relator because of unfair treatment. Caught redhanded in an attack upon the Government of the United States and the security of American institutions, he comes before our Courts, not upon the plea that he is innocent, nor that he is a citizen born or naturalized, but solely upon the ground that his status, which he can not deny, was proved by a method not technically correct. Such a plea merits scant consideration.

CONCLUSION.

The decree of the Court below was correct and should be affirmed. The appellant was not subjected to an unlawful search or seizure, was not required in any criminal case to be a witness against himself, and was not deprived of his liberty without due process of law. The order of deportation made by the Secretary of Labor, upon evidence legally competent and after a full and fair hearing, is valid, and should be sustained.

JAMES M. BECK,
Solicitor General.
GEORGE ROSS HULL,
Special Assistant to the Attorney General.

OCTOBER, 1923.

O